

SCC 2023 Analytics

Ad hoc vs. Institutional Arbitration in Construction Disputes

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This report examines and compares disputed values, costs, length and the number of arbitrators in construction disputes resolved in Sweden in 2017 – 2022. The report is based on data collected from 60 construction arbitrations: 35 *ad hoc* proceedings and 25 proceedings under the SCC Rules. The report confirms that in Sweden, settling construction disputes by *ad hoc* arbitration is generally more expensive and takes generally longer time than if administered by the SCC.

Table of Contents

- 1. Background and objectives 6
- 2. Methodology 7
- 3. Results of the study 8
 - 3.1 Number of arbitrators 8
 - 3.2 Disputed amounts 8
 - 3.3 Average costs 9
 - 3.4 Costs vs disputed value 10
 - 3.5 Benchmarking the costs 11
 - 3.6 Time to the award 12
 - 3.7 Other parameters to consider 13
- 4. Conclusions 15

Executive Summary

- This report examines and compares construction disputes resolved in Sweden in 2017 – 2022. The report is based on data from 35 *ad hoc* arbitrations and 25 SCC arbitrations.
- The report confirms that in Sweden, settling construction disputes by *ad hoc* arbitration is generally more expensive and takes generally longer time than if the arbitration was managed at the SCC Arbitration Institute (SCC).
- The average disputed value in SCC arbitrations is generally substantially higher than the disputed amount in *ad hoc* arbitrations is. The average disputed value in *ad hoc* arbitrations is EUR 4.8 million. For SCC arbitrations, that value is EUR 64.1 million.
- On average, a three-member *ad hoc* tribunal takes 18.1 months to render an award. In regular SCC arbitrations in construction disputes, it takes 15.8 months to render an award. A sole arbitrator in an expedited SCC arbitration takes about 6.4 months, on average, to render an award.
- In SCC arbitrations with three-member tribunals, average costs are about 40% lower than in *ad hoc* arbitrations.

SCC arbitration vs ad hoc arbitration

SCC arbitration

In SCC arbitrations the dispute is administrated by the SCC. The administration includes decisions on appointment of arbitrators, on costs of the arbitration and on time for rendering the award. In SCC arbitrations, parties and tribunals are also provided with a web-based case management platform (the SCC Platform), record-keeping, and fund-holding services. The costs are fixed at a certain percentage of the disputed value.

Ad hoc arbitration

In *ad hoc* arbitrations, the administration is performed by the arbitral tribunal, who also decides on its own fees and on the time for rendering the award. The costs in *ad hoc* arbitrations are based on the hourly fees of each member of the tribunal.



1. Background and objectives

This report is based on the results of a survey comparing the procedural features of construction disputes resolved in Sweden during 2017–2022, done in February 2023 by the SCC Arbitration Institute (SCC). The survey was based on data collected from 60 arbitrations: 35 *ad hoc* proceedings and 25 proceedings under the SCC Rules. The study examines and compares disputed values, costs, length and the number of arbitrators in the two groups of cases. It then benchmarks *ad hoc* tribunals' costs against the SCC table of costs applicable at that time.

The study's objective is two-fold. First, it measures the efficiency of the procedural mechanisms used to resolve construction disputes in Sweden. Second, it outlines each mechanism's features as well as their ability to meet arbitration users' specific needs.

Any comparison between *ad hoc* and institutional arbitration's suitability and efficiency requires detailed, data supported discussion. However, because of the confidentiality of most arbitrations, such information is not readily accessible by arbitration users or their counsel. This is why the SCC carried out the underlying study and put this report together.

2. Methodology

Swedish parties tend to incorporate standard contracts, such as AB 04 and ABT 06. In them, disputes are typically settled by *ad hoc* arbitration making *ad hoc* arbitration the most common way of resolving construction disputes in Sweden. This has led to the creation of a construction dispute settlement niche, occupied by specialised construction lawyers with the expertise to settle such disputes.

The SCC initiated the underlying survey by contacting arbitration practitioners who had been involved as arbitrators or as counsel in construction disputes resolved under the SCC Rules during 2017–2022. They were asked whether they had acted as arbitrator or counsel in any *ad hoc* construction arbitrations during that period, and whether they could reveal the following features of those disputes:

- the number of arbitrators,
- the disputed amount,
- the aggregate amount of the arbitrators' fees and costs.
- the time between the request of arbitration and the final award, and

In total, the SCC received answers about 35 *ad hoc* arbitrations. Those answers were compared against the corresponding figures in construction disputes administered by the SCC in 2017–2022.

The study compares several figures. It compares the average time to award in *ad hoc* arbitrations with that in SCC construction arbitrations. It also compares maximum, minimum and average disputed values in *ad hoc* and SCC arbitrations. It then compares the average disputed value against the costs in each category. The costs are presented as a percentage of certain intervals of claimed amounts to obtain as objective a result as possible. Finally, it benchmarks the costs in each *ad hoc* arbitration against the SCC table of costs.

3. Results of the study

3.1 Number of arbitrators

The arbitral tribunal was composed of a sole arbitrator in only 3 of the 35 responses the SCC received concerning *ad hoc* arbitrations. The corresponding figure in SCC arbitrations was 8 of the 25 surveyed cases, with 1 of those arbitrations conducted under the regular SCC Rules, and the other 7 under the SCC Rules for Expedited Arbitrations.

That means most of the *ad hoc* arbitrations were conducted by three-member tribunals. This is probably because parties to *ad hoc* arbitrations tend to rely on the default number of arbitrators (3) established by the Swedish Arbitration Act.³ In the SCC's view, the answers received regarding *ad hoc* construction arbitrations settled by a sole arbitrator are too few for the SCC to draw any conclusions. Therefore, no such conclusions are presented below.

3.2. Disputed amounts

There is a wide range of claimed amounts in both *ad hoc* and SCC construction arbitrations. Of those analysed, the lowest disputed amount for *ad hoc* arbitrations was EUR 150,000. For SCC arbitrations, it was EUR 54,031.

The highest disputed amount for *ad hoc* arbitrations was EUR 19.4 million. For SCC arbitrations, that amount was EUR 742.1 million.

The spread between the smallest and biggest claim is larger in SCC arbitrations, as compared to *ad hoc* arbitrations.

Small claim disputes in *ad hoc* arbitration in Sweden are infrequent since the Swedish standard contracts, which we mentioned earlier, typically direct parties to pursue court litigation for claims below a specific threshold amount.

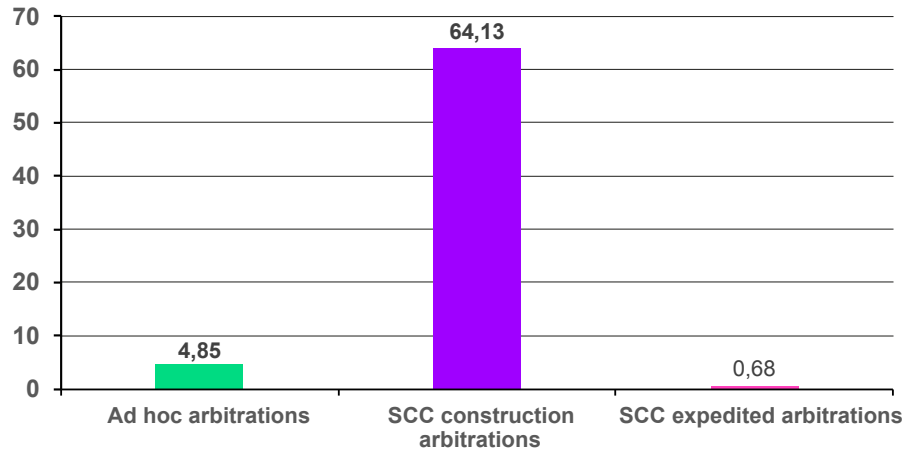
Among the 25 surveyed SCC cases, 11 involved claims under EUR 0.5 million, while only 3 of the *ad hoc* cases surveyed were related to values below EUR 0.5 million. In SCC arbitrations, small claims are usually resolved in SCC expedited proceedings, which provides parties with cost-effective alternative both to *ad hoc* arbitration and to litigation.

The highest disputed amount for *ad hoc* arbitrations was EUR 19.4 million. The highest value in SCC arbitrations was

EUR 742.1 million

Average claim

Million EUR



The difference in the highest disputed amounts may indicate that parties to large projects prefer SCC arbitration over *ad hoc*.

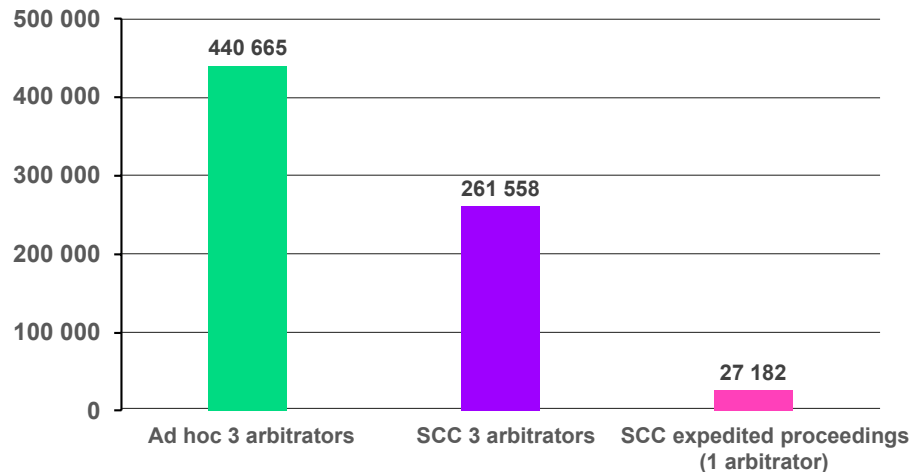
The average claim in an ad hoc arbitration is EUR 4.85 million. For SCC construction arbitrations with three arbitrators, it is EUR 64.13 million. In the cases resolved under the SCC Rules for Expedited Arbitrations, the average claim was EUR 677,543. In other words, construction arbitrations administered by the SCC tend to involve larger claims than those in *ad hoc* arbitrations.

3.3. Average costs

When assessing the costs of an arbitration, it should be noted that *ad hoc* and SCC arbitrations use different cost calculation principles. SCC arbitrations apply an ad valorem system, whilst *ad hoc* arbitrations prefer hourly fees. Both systems have their up- and downsides. The ad valorem system binds the fees to the disputed value providing greater predictability on costs. The downside, however, is that ad valorem fees do not always

Average arbitration costs

EUR



reflect the amount of work demanded by a case. The hourly fee system implies better remuneration for arbitrators but makes calculating the final costs less predictable.

For the purposes of the survey, the respondents estimated the costs of *ad hoc* arbitrations as the sum of the fees and disbursements of all tribunal members. The parties' fees for their own counsel are not included in the sums.

Based on the respondents answers, the average cost of an *ad hoc* construction arbitration was EUR 440,665.

For SCC arbitrations, average costs were EUR 261,558 for arbitrations with three arbitrators and EUR 27,182 for expedited arbitrations with one arbitrator.

Even though the average cost for SCC arbitrations include the SCC's administrative fee (in addition to the tribunal's fees and disbursements), average costs in SCC construction arbitrations with three arbitrators were about 40% lower than in *ad hoc*.

3.4. Costs vs disputed value

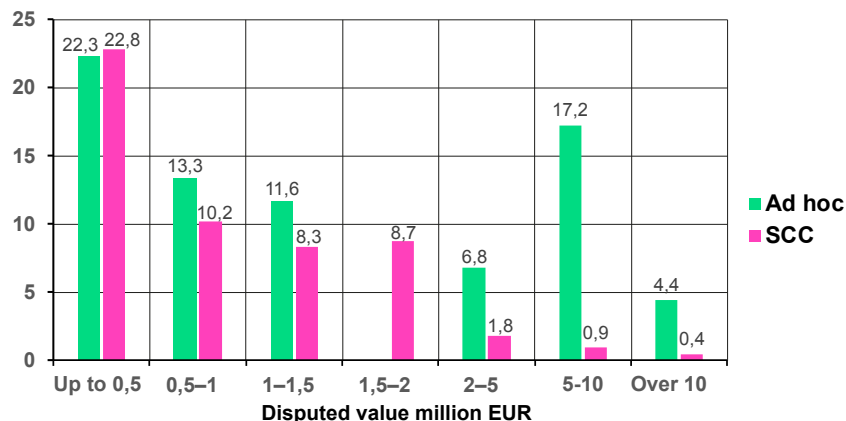
The chart below groups the surveyed *ad hoc* and SCC arbitrations according to amount in dispute and presents costs as a percentage of that amount.

The percentage is an average for all the surveyed cases falling within the specified intervals. The majority of surveyed SCC expedited cases had claimed amounts below EUR 0.5 million. As a result, the chart above reflects the costs of expedited proceedings only for this segment of disputed values.

Average costs in *ad hoc* and SCC standard arbitrations are similar in small-value disputes (up to EUR 0.5 million), if three arbitrators are appointed. However, average costs for *ad hoc* arbitrations exceed those for SCC arbitrations in all disputes where the disputed

Arbitrations costs

Percentage of disputed value



value is higher than EUR 0.5 million, regardless of the applicable rules. This despite the fact that the SCC's costs include both tribunal's fees and the SCC administrative fee.

As explained above, SCC and *ad hoc* regimes use different principles for calculating costs. Nevertheless, the percentage of the costs should, in general, be inversely proportionate to the disputed value – irrespective of which system applies (i.e. the bigger the claimed amount, the smaller is the percentage of the costs). However, the average in *ad hoc* arbitrations indicates significant deviation from this principle in the higher segment of disputed value (EUR 5–10 million). This confirms that costs in *ad hoc* arbitrations are less predictable.

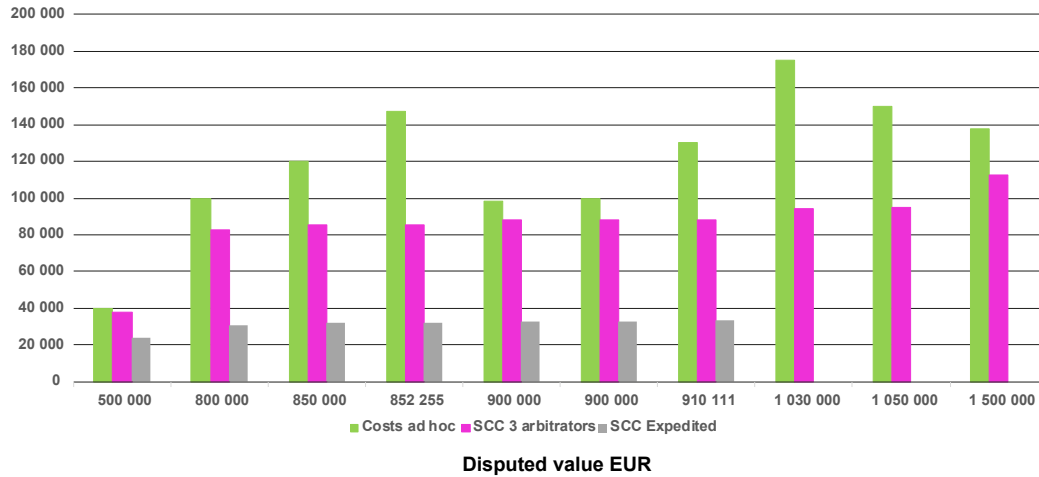
3.5 Benchmarking the costs

Following from the above analysis, the overarching picture is that *ad hoc* construction arbitrations are more expensive than SCC arbitrations. The charts below compare the responses received in *ad hoc* arbitrations with the SCC table of costs in standard and expedited proceedings. It should be noted that the SCC may adjust the fees up to a certain amount (“the maximum fee”) if the case turns out to be more complex than expected.

In this context, a few respondents expressed views that the SCC rates are sometimes ill-suited to construction cases where, in addition to multiple claims, there are many disputed issues. In other words, a few respondents considered that the size and complexity of construction disputes require arbitrators to work more and hence to be paid more. However, as stated above, the SCC has the power to adjust arbitrators' fees in accordance with the case's complexity, when determining the arbitration's costs. Controlling the costs of arbitration benefits parties to arbitrations.

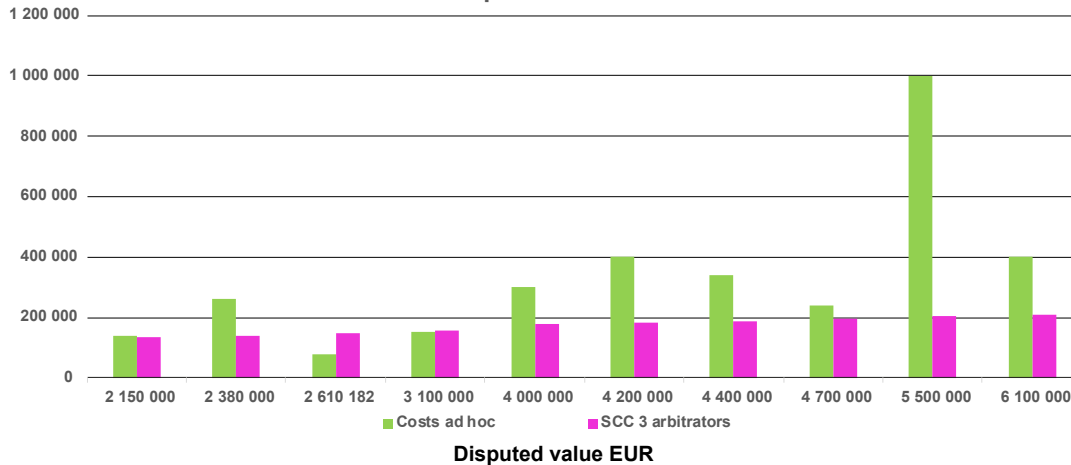
Costs: *ad hoc* vs SCC (median)

Table 1: Disputes up to 1.5 mil EUR



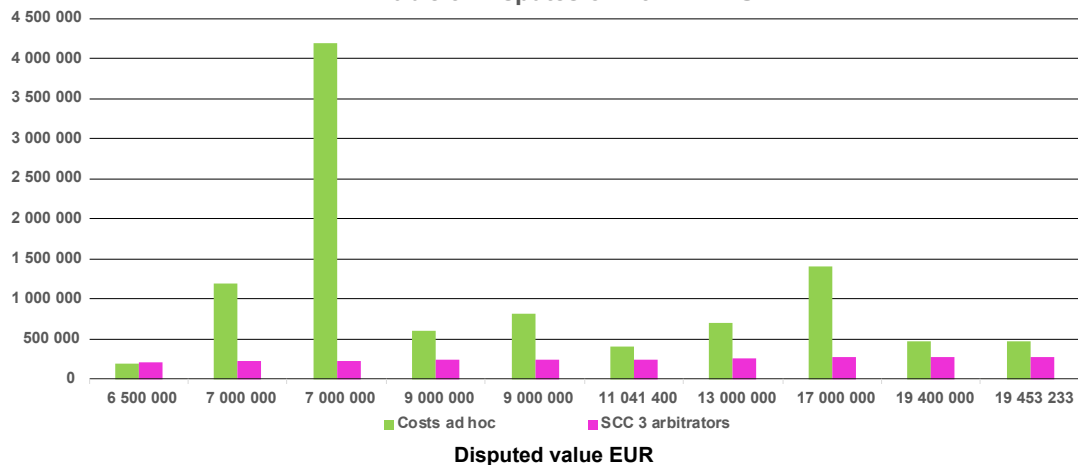
Costs: *ad hoc* vs SCC (median)

Table 2: Disputes of > 1.5 to 6.1 mil EUR



Costs: *ad hoc* vs SCC (median)

Table 3: Disputes of > 6.1 mil EUR



3.6 Time to the award

The length of the arbitrations differed greatly between the surveyed *ad hoc* cases. The fastest full-scale *ad hoc* arbitration was seven months, while the longest took 60 months from the request for arbitration to the final award. Those times also differed in SCC construction arbitrations. While the shortest arbitration took three months, the longest arbitration took 44 months.

Meanwhile, the average time to award in *ad hoc* construction arbitrations was 18.1 months from start to finish, whereas the average processing time in SCC arbitrations with a three-member tribunal was 15.8 months. SCC expedited proceedings took 6.4 months, on average.

Regular SCC arbitrations are therefore 2.3 months quicker than *ad hoc* arbitrations even though SCC cases have higher average disputed values, which implies greater complexity. SCC expedited arbitrations are about three times quicker than *ad hoc* arbitrations.

The length of an arbitration is a particularly sensitive factor for construction parties, especially if they are forced to pause their ongoing project pending the outcome of the arbitration. The SCC rules set out a streamlined procedure, which lowers the risk of procedural disagreements during arbitration. The SCC applies transparent routines for administering arbitrations. In contrast, in *ad hoc* arbitrations, the responsibility for case administration is left to the arbitrators, who must split their focus between administrative issues and dispute adjudication. This is arguably more time consuming than would be the case in an SCC administered arbitration.

Time to the award

Average time, months



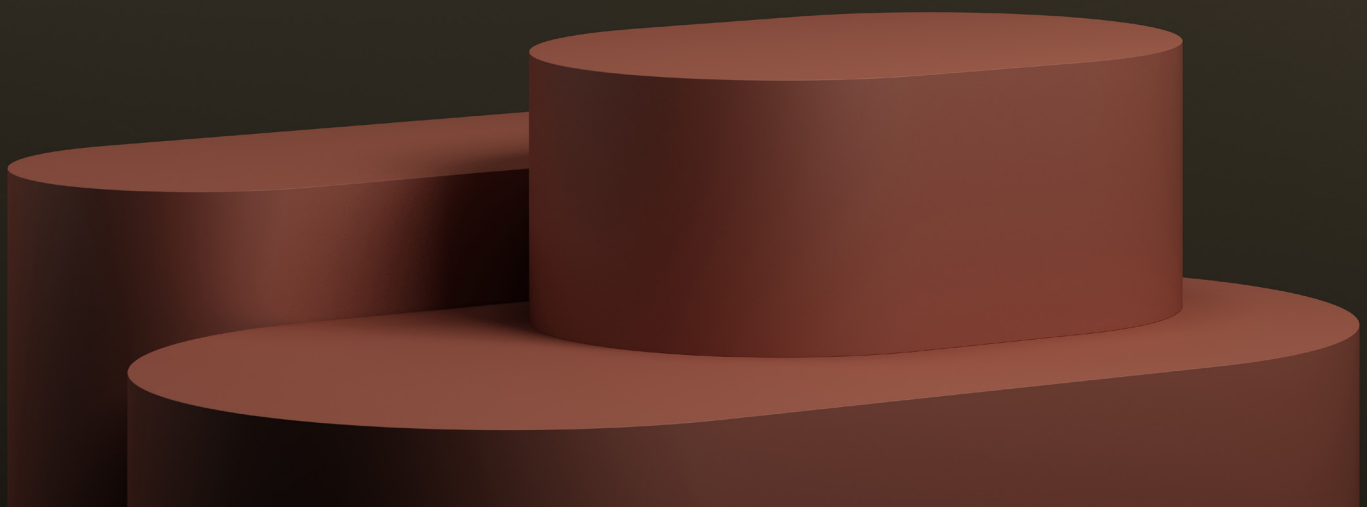
3.7 Other parameters to consider

Length of proceedings and costs are not the only relevant parameters when choosing a dispute resolution mechanism. There are other characteristics to consider.


SCC arbitration rules are regularly updated to reflect developments in the arbitration industry and in the users' needs. Therefore, they incorporate useful procedural mechanisms, which might not be available to parties in *ad hoc* arbitration. Examples of such mechanisms include emergency arbitration, summary procedure, joinder of parties, consolidation of parallel arbitrations, and multi-contract arbitrations.

Institutional arbitration's key advantage, however, lies in its system of checks and balances which safeguards the proceedings' legitimacy and ethical standards. Such a system is implemented through appointment policies, impartiality/independence screening upon appointment, reasoned decisions on challenges, clear rules on fees and compensation for costs, the power to dismiss an arbitrator who does not perform his/her functions, clear procedural deadlines and many other mechanisms to ensure that the tribunal does its job well and the parties have recourse, if any concerns arise.

In short, institutional arbitration rules make it possible to uphold and enforce ethical values, such as expedition, transparency, and diversity.



From this survey, it can be concluded that, in general, the SCC is a more expeditious venue for resolving construction disputes than ad hoc arbitration in Sweden.



**Settling construction
disputes in Sweden by
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4. Conclusions

The above analysis shows that settling construction disputes by *ad hoc* arbitration in Sweden is more expensive and takes longer than if administered by the SCC. Despite higher costs, *ad hoc* arbitration offers less procedural efficiency and predictably, and entails a higher risk of procedural complications. It is therefore questionable, from an arbitration user's perspective, whether *ad hoc* arbitration is the most suitable dispute resolution mechanism for construction disputes.

The SCC acknowledges that other parameters, such as arbitrators' expectations for remuneration, have to be considered. Nevertheless, the study provides concrete figures for measuring efficiency – a key factor in evaluating *ad hoc* arbitration's suitability in resolving construction disputes.



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